Supreme Court
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No. 75-784

In the
Supreme Court of the United States
October Term, 1975

WILLIAM E. SIMON,
SECRETARY OF THE TREASURY,
et al., *Petitioners*

vs.

MARGOT E. CARO,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Are defendants in a Title VII employment discrimination action in the district court entitled to summary judgment on their Rule 56, Federal Rules of Civil Procedure motion, where:

A. the district court repeatedly refused to allow plaintiff the opportunity to take depositions for the purpose of making her defense to the defendants' Rule 56 Motion; and

B. the Certified Administrative Record submitted in support of the motion contained overwhelming statistical evidence of discrimination on the basis of sex in the promotion of female Internal Revenue Agents; and

C. the plaintiff in the case is a female Internal Revenue Agent; and

D. the Certified Administrative Record contained no substantial evidence of non-discriminatory reasons for the failure to promote the plaintiff; and

E. at the very least, there were genuine issues of material fact?

II. Is a federal employee entitled to a trial *de novo* in a district court civil action filed pursuant to §706(f) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-5(f) after exhausting her administrative remedies in accordance with the provisions of §717 of the Act, 42 U.S.C. §2000e-16?

STATEMENT OF THE CASE

Respondent would add the following facts to petitioner's Statement:

> In the district court, Defendants filed the certified administrative record of the proceedings within the Internal Revenue Service and before the Complaint Examiner, together with an answer, motion to dismiss and motion for summary judgment. While the district court was considering those matters, it barred the discovery sought by Plaintiff. (Appendix A, pp. 2a-3a, Government's Petition for a Writ of Certiorari)

At the administrative hearing of respondent's charges of sex discrimination in employment within the Internal

Revenue Service—Chicago District Office, the testimonial evidence was supplemented with voluminous documentary evidence, all of which was included in the administrative record considered by the District Court in arriving at its decision to grant the government's motion for summary judgment.

The documentary evidence in the administrative record submitted by the government in support of its motion for summary judgment contained the following facts:

> . . . Plaintiff joined the Chicago office of the Internal Revenue Service at a salary level of GS-9 in July, 1966. She reached the salary level of GS-12 in February, 1970, and stayed at that level throughout the course of this litigation.
>
> From October, 1971, through October, 1972, in accordance with customary procedures, her agency established three promotion rosters but did not include Plaintiff in any of them, although she had been recommended for inclusion by her immediate supervisors on each occasion. The October, 1971, preliminary promotion roster contained 137 eligible GS-12 revenue agents, of which seven were women. The members of the *ad hoc* committee dealing with promotions chose 37 agents for the final roster, including one woman. However, only two agents were promoted to GS-13 from that roster and both were males. The ratio of men to women at the GS-12 level was 9:1.
>
> Out of 35 persons placed on the April, 1972, promotion roster, only one was a woman although 12 were eligible. Seventeen male agents were promoted to GS-13, and no woman was promoted to that category. In October, 1972, eleven women were eligible for inclusion in the GS-13 promotion roster. One woman and 29 men were selected for the roster. Fifteen male agents were promoted therefrom to GS-13 but no woman was promoted.

During the period from September, 1970, to October, 1972, 75 male agents were promoted but only one woman was promoted to GS-13.

In summary, during the two and one-half years in question, one female GS-13 was replaced by another, so that there was only one GS-13 female revenue agent out of 214 throughout the period. During the five promotion periods in question, only one woman was promoted out of 75 persons promoted. (Appendix A, pp. 4a-5a, Government's Petition for a Writ of Certiorari)

ARGUMENT

I.

The government's petition for certiorari in this case is based solely on the fact that the *de novo* issue in this case is the same as that presented in *Chandler* v. *Roudebush*, No. 74-1599, certiorari granted, October 6, 1975. As in the Court of Appeals below, the government refuses to recognize the facts in this case—the facts that were presented during the administrative hearing and again in support of the government's own motion for summary judgment in the district court. Those facts, which were recited by the Court of Appeals in its decision below (Appendix A, pp. 4a-7a, Government's Petition for Certiorari) make the granting of the government's petition in this case inappropriate no matter what this court decides in the *Chandler* case.

If in *Chandler* this Court decides that a federal employee is entitled to no more than a review of the administrative record in the district court, the decision of the Court of Appeals for the Seventh Circuit in this case was proper. If this Court decides that a federal employee is entitled to a full trial *de novo* in the district court, the decision of the Court of Appeals for the Seventh Circuit in this case was proper. And, if this Court decides that a federal employee is entitled to some hybrid of the above two types of proceedings in the district court, the decision of the Court of Appeals for the Seventh Circuit in this case was proper.

This is so because the administrative record in this case which was the sole factual record before the district court

when it granted the government's motion for summary judgment contains enough evidence of sex discrimination in employment by the defendants-petitioners to compel a reversal of the district court decision. The Seventh Circuit's decision to reverse and remand was proper whether or not respondent was entitled to a trial *de novo* in the district court.

It cannot be over-emphasized that even if this court decides that a federal employee filing a Title VII case in the district court is entitled to no more than an action in the nature of judicial review, the Seventh Circuit Court of Appeals decision in this case was correct. The district court decision in this case was wrong and must be reversed and remanded as ordered by the Court of Appeals.

II.

The failure of both the district court and the Complaint Examiner before him to recognize the factual and legal importance of the statistical evidence in this case has led to substantial injustice and suffering by the respondent herein. Courts have consistently found statistics to be admissible, competent and compelling evidence of discrimination in Title VII employment discrimination cases. *Schulz* v. *Hickok Mfg. Co., Inc.*, 358 F.Supp. 1208 (D.C. Ga., 1973); *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (C.A. 5, 1972); *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (C.A. 5, 1973); *Johnson* v. *University of Pittsburgh*, 359 F.Supp. 1002 (D.C. Pa., 1973).

In fact, the case law is clear that statistical evidence of gross discrimination against a protected class of people establishes a *prima facie* case of discrimination. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (1970); *Wetzel* v. *Liberty Mutual Ins. Co.*, 372 F.Supp. 1146 (D.C.

Pa., 1974). Once a *prima facie* case of discrimination is established, the burden of proof then shifts to the employer to articulate legitimate, non-discriminatory reasons for the challenged action, which in this case was the failure to promote respondent. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Hodgson* v. *First Federal Savings & Loan Association of Broward County, Florida*, 455 F.2d 818 (C.A. 5, 1972).

Applying the above stated rules of law to the instant case, which we must do, we find enormously compelling statistical evidence of discrimination against female revenue agents above the GS-12 level. (See Appendix A, pp. 4a-5a, Government's Petition for a Writ of Certiorari)

The statistics themselves cause the government to have to come forward to positively show that the entire evaluation, recommendation and promotion system employed by the IRS, which admittedly has resulted in *de facto* sex-discrimination, has some substantial relation to a legitimate governmental interest, such as the promotion of qualified agents. *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Comm., City of New York*, 6 EPD ¶8904 (D.C.N.Y., 1973); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (C.A. 2, 1972). The district court did not compel the government to do this. And, without more, plaintiff-respondent should have prevailed in the district court.

Neither the substantive law on employment discrimination, nor the case law rules governing the shifting burden of going forth with evidence as outlined in *McDonnell Douglas Corp.* v. *Green, supra,* can be suspended or abrogated merely because the Plaintiff is a federal employee. And if that be so, there is no doubt that the district court erred in granting summary judgment for the government

in this case. On the record had in this case, it is clear that the decision of the Court of Appeals for the Seventh Circuit was absolutely correct, whether or not a federal employee is entitled to a trial *de novo*.

III.

> Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *Washington* v. *Cameron,* 411 F.2d 705 (1969), quoting from the Supreme Court opinion in *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L. Ed. 967 (1944).

Although Appellant herein has no claim to a trial by jury, she does claim a right to a trial by a judge on her complaint for equitable and injunctive relief. Even more than a complaint for damages, a complaint for injunction requires a full evidentiary hearing before the judge from whom the injunction is sought. *Boles* v. *Union Camp Corp.,* 57 F.R.D. 46, 16 F.R. Serv. 2d 1561 (1972).

If there is any doubt on the question of whether there is a genuine issue as to any material fact, such doubt must be resolved in favor of the party opposing the motion. *Rodway* v. *U.S. Department of Agriculture,* 482 F.2d 722 (1973); *Ozark Milling Co., Inc.* v. *Allied Mills, Inc.,* 480 F.2d 1014 (1973). And, as the courts have said, if there are inferences drawn from admitted underlying facts, those inferences must be drawn in the light most favorable to the party against whom the motion for summary judgment is directed. *International Association of Machinists and Aerospace Workers, Dist. No. 8, AFL-CIO* v.

J. L. Clark Co., 471 F.2d 694 (1972). The Seventh Circuit properly assessed the facts before the district court in this case as compelling a reversal of the summary judgment in favor of the government under the standards of Rule 56 FRCP (Appendix A, pp. 4a-7a, Government's Petition for a Writ of Certiorari).

Since question I presented—whether the government was entitled to a Rule 56 FRCP summary judgment in this case—must be answered in the negative, this court need not reach question II—whether a federal employee is entitled to a trial *de novo* on her Title VII complaint in the district court. In fact, since question II, involving a very important issue, is already before this court in *Chandler* v. *Roudebush, et al.,* No. 74-1599, October Term, 1975, there is no legal or public policy reason for the court to grant the government's petition for a writ of certiorari in this case.

CONCLUSION

Respondent prays this court deny the government's petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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